i.e. to any person, it cannot be said that it did not approve the sale of the land to the defendant.

At the time of the agreement on the 1st day of June, 1945, no doubt it was necessary, before the transaction could be completed for the defendant to obtain the approval of the Japanese Governor of Selangor. The defendant, in fact, did apply to the Japanese Governor, and I do not think there was any undue delay in his making the application. It cannot be said that the approval of the Japanese Governor was ever refused. He, in fact, left the Federation shortly afterwards without granting or refusing approval. Paragraph 4 of the agreement reads as follows:—

"The parties hereto agree that should the High Court refuse to grant to the Vendor leave to sell the said property to the Purchaser or if such leave having been granted approval of the said purchase is refused by His Excellency the Governor of Selangor then in either of such cases, this agreement shall become null and void and the deposit of $33,000 now paid shall then be refunded by the Vendor to the Purchaser."

Having regard to the fact that the approval of the Japanese Governor was never refused, and that subsequent to his departure it became unnecessary for his approval to be obtained in order to legalise the sale, I am of opinion that the plaintiffs cannot now rely on the fact that the approval was not obtained in order to establish that the agreement of the 1st day of June, 1945 is null and void and of no legal effect.

As a result I give judgment for the defendant with costs.

Judgment for the defendant.

CHOP CHIN SOON HENG v. CHOP SIN HOCK HIN & ORS.

[Orig. Civ. Juris. (Spenser Wilkinson, J.)
February 13, 1952]

[Penang — Civil Suit No. 424 of 1950]

Libel — Qualified privilege — Evidence of malice —Submission of no case.

Two paragraphs in a letter by the defendants to the Controller of Supplies contained matter which the plaintiffs said were libellous. The plaintiffs conceded that the letter was written in circumstances rendering its writing an occasion of privilege. At the conclusion of the plaintiffs' case the defendants submitted that there was no evidence of malice such as would entitle the plaintiffs to succeed; the defendants did not elect one way or another whether they proposed to call any evidence.

Held, that in a trial before a Judge alone a ruling on a submission that there is no evidence of malice will only be made after all the evidence has been heard. If, therefore, the defendants wish to make this submission at the close of the plaintiffs' case they must elect to call no evidence and rest upon the submission.

Cases referred to:—

(1) *Alexander v. Rayson* (1936) 1 K.B. 178.
(2) *Laurie v. Raglan Building Co. Ltd.* (1942) 1 K.B. 153.
(3) *Parry v. Aluminium Corporation* 162 L.T. 236.
(4) *Young v. Rank* (1950) 2 All E.R. 166.
(5) *Marbe v. George Edwards Ltd.* (1928) 1 K.B. 269.

ACTION for damages.

R. D. Hume for the plaintiffs.

F. G. Pooley for the defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The plaintiffs' claim in this case is for damages for libel contained in a letter written by the defendants to the Controller of Supplies, Federation of Malya on the 16th September, 1950. Two paragraphs in that letter are particularly relied on as being libellous.

It was conceded at the outset by Counsel for the plaintiffs that the letter in question was written in circumstances which rendered the occasion of its writing an occasion of qualified privilege.

At the conclusion of the case for the plaintiffs Counsel for the defendants submitted that the words complained of were not capable of a defamatory meaning and that there was no evidence of malice such as would entitle the plaintiffs to succeed in the action. He did not, however, make any election one way or the other as to whether or not he proposed to call any evidence.

After careful consideration of the authorities I have come to the conclusion that as regards the submission upon the question of whether or not there is any evidence of malice I ought not to give a ruling until all the evidence has been called. If Counsel for the defendants will now state that he intends to rely on the submission alone and to call no evidence I will then be prepared to give a ruling on the subject, but if not, then I must hear the whole of the evidence before reaching a decision on this point.

The law on this subject is stated in *Odgers* on Pleadings and Practice in the chapter headed "Trial" at page 257 as follows:—

"The defendant's counsel must now make up his mind whether to call evidence or whether to submit that the plaintiff has made out no case to answer in law. He will not nowadays be allowed to submit no case unless

he tells the Judge that he intends to rely on the submission alone and call no evidence. This is called standing on the submission. (See Alexander v. Rayson[1]).”

The case of *Alexander v. Rayson*[1] just cited was followed and approved in *Laurie v. Raglan Building Co. Ltd.*[2] where Lord Greene, M.R. said :—

“It is unfortunate, I think, that the learned judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this court, of refusing to rule on the submission unless counsel for the defendant said that he was going to call no evidence. That must be regarded as the proper practice to follow and it is to be found very lucidly set out, if I may say so, in the judgment of Goddard, L.J., in Parry v. Aluminium Corporation[3].”

In *Young v. Rank*[4] Davlin, J. decided in an action concerning breach of warranty and wrongful dismissal that in a jury action the judge had a discretion as to whether he would rule upon a submission without putting Counsel for the defendants to his election. In the course of his judgment he reviewed the authorities and drew particular attention to the distinction between cases tried by a judge alone and cases tried by a judge with a jury. Commenting on the case of *Alexander v. Rayson*[1] he says :—

“There is a further matter which I think is of some importance. In a case tried by a judge alone the Court of Appeal has a complete power of re-hearing, and if evidence for the defendant has not been taken and the Court disagrees with the ruling of the trial judge, it is, in effect, prevented from exercising its power of re-hearing and has no alternative but to send the case back for re-trial, which will result in additional costs to the parties.”

I look upon this passage in the judgment of Devlin, J. as of great importance.

There are passages in the judgment of Goddard, L.J. in *Parry v. Aluminium Corporation Ltd.*[3] which give rise to the suggestion that the usual rules do not apply to defamation cases. That was a negligence case and after setting out the practice he says :—

“I think that that is the proper course to take in these cases. I do not say that it is the right course in every kind of action, because in defamation cases, for instance, I believe there is authority for saying that, if it is submitted that there is no evidence of malice, the judge is bound to rule. Also in slander cases the judge must rule if the submission is made that the words are not actionable without proof of special damage and no special damage is alleged.”

With the greatest respect I am unable to discover the authority which Goddard, L.J. said he believed to exist for saying that if it is submitted that there is no evidence of malice the judge is bound to rule.

There are two passages in *Gatley* on Libel and Slander, Third Edition, which deal with this point. At page 318 the following passage appears :—

“The submission that there is no evidence of malice to go to the jury is also invariably made at the close of the plaintiff's case. But the judge is not bound to give his ruling then: under the present practice he has a discretion whether he will rule at the close of the plaintiff's case, or whether he will defer ruling on the matter until after he has heard the evidence for the defendant.”

The authority cited in support of this proposition is the case of *Marbe v. George Edwardes Ltd.*[5], but it is correctly pointed out in the footnote that Bankes, L.J. in that case stated that the defendant's counsel must elect whether he will rely on his objection that there is no evidence of malice or call evidence for the defendant at the risk of supplying evidence for the plaintiff which the jury may accept as proving malice.

At page 678 the following passage, which was relied on by Counsel for the defendants, appears in *Gatley* :—

“If the facts which gave rise to the privilege are elicited by cross-examination of the plaintiff or his witnesses, counsel for the defendant will be in a position at the close of the plaintiff's case to submit that the occasion was privileged and that there is no evidence of malice to go to the jury, and, if successful in his submission, will avoid the necessity of calling the defendant to establish the privilege, and avoid also the risk of affording in cross-examination evidence of malice which might defeat the privilege.”

No authority, however, is cited in support of this proposition, and I do not think it is supported by the authorities I have referred to. Reading all these authorities together it seems to me that the rule laid down is, that in cases tried with a jury the judge has a discretion in certain circumstances to rule on the submission without putting Counsel to his election, but that in all cases tried without a jury the judge should not rule on the submission of no case upon any point which in any way depends upon evidence, unless Counsel for the defendant elects to call no evidence.

If I acceded to the proposition of Counsel for defendants it seems to me that I should in effect be answering a purely hypothetical question — is there sufficient evidence of malice to go to a jury? That is hypothetical, because there is in fact no jury. When all the evidence has been given (that is to say either at this stage if the defendants call no evidence, or otherwise at the conclusion of the case) the question I shall have to decide is a different one, namely : has the plaintiffs discharged the onus upon them of providing malice? The two questions are, no doubt, very similar, but I think there is a substantial difference between them, and I think that a judge trying the case alone should only be called upon to answer the second question.

As regards the submission that there is no evidence of malice in the present case I feel bound to follow the cases of *Alexander v. Rayson*[1] and *Laurie v. Raglan Building Co. Ltd.*[2]. The submission that

the words complained of are not capable of a defamatory meaning stands, I think, on a somewhat different footing, because this depends not upon the evidence but upon my construction of the actual words complained of. I do not, however, express any definite view as to whether or not a submission on the question of libel or no libel can be made without an election by Counsel for the defendants. I will content myself now with expressing the view that the words in paragraph 4 of the letter complained of are, in fact, capable of a defamatory meaning, without saying whether or not in the circumstances of the case they actually constituted a libel. The result is that if Counsel for the defendants now informs me that he does not propose to call any evidence I shall then have to rule one way or the other on the question of whether there was in fact a libel and if so, whether any evidence of malice has been proved. If Counsel does not so inform me I shall not decide these questions until I have heard the whole of the evidence.

Ruling answered.

N.KR. ARUNACHALAM CHETTIAR v. THE MERCANTILE BANK OF INDIA LTD. & FIVE OTHERS.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and Briggs, JJ.) February 16, 1952]

[Ipoh — F.M. Civil Appeal No. 27 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 11(c).

In 1941 the appellant as attorney of K charged certain lands to the Bank (the 1st respondent); during the Occupation a discharge was obtained from the Japanese Custodian, such discharge being duly registered. Shortly before this the appellant had executed a transfer of the property to purchasers (the 2nd, 3rd, 4th and 5th respondents) but this transfer, although presented, was not registered. Under the Debtor and Creditor (Occupation Period) Ordinance, 1948, the Bank applied by way of an originating summons for revaluation and reinstatement, and joined the other respondents to the appeal. The summons was heard in open Court; the appellant asked for but was refused adjournment; he appeared to take no further part in the proceedings. The Bank's claim was admitted. The purchasers applied for a vesting order, which was made, and the Court further ordered the appellant to pay the costs and to indemnify the purchasers against costs and liability under the reinstated charge.

In allowing the appeal the Court of Appeal commented that procedure by way of originating summons to decide issues raised between the appellant and the purchasers was cumbersome and unsatisfactory.

Briggs, J. held that in an application under section 11(c) of the Debtor and Creditor (Occupation Period) Ordinance, the Court had no jurisdiction to determine the claim of a person to be a bona fide purchaser.

Cases referred to:—

(1) *Cargill v. Bower* 10 Ch. D. 502 at 508.

(2) *Diana Ellis v. Khoo Ek Neo* (1950) M.L.J. 270.

(3) *Fry v. Moore* 23 Q.B.D. 397 at 399.

(4) *Chief Kwame Asante v. Chief Kwame Tawia* (1949) W.N. 40.

COURT OF APPEAL.

S. M. Sharma for the appellant.

H. T. Ong for respondents No. 2, 4, 5 & 6.

Respondents No 1 & 3 not represented.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Pretheroe, Ag. C.J.: — On the 25th day of April, 1941, Arunachalam Chettiar, as attorney of Karuppan Chettiar, charged certain lands with the Mercantile Bank of India Ltd., at Ipoh (hereinafter referred to as the Bank) as security for an overdraft amounting to $8,000. On the 7th June, 1943, Arunachalam Chettiar, as attorney for Karuppan Chettiar, executed an agreement to sell the same lands to four money-lenders (hereinafter referred to as the purchasers) and received the purchase price.

On some date, which is apparently not known, the Japanese Liquidation Officer, acting on behalf of the Japanese Custodian, transferred the benefit of the charge from the Bank to the Custodian as being enemy property. Arunachalam was then required to liquidate the debt forthwith and did so. The discharge was duly registered on the 13th of September, 1943, and Arunachalam delivered the discharge of the charge, together with a memorandum of transfer, to the purchasers. The latter presented the documents for registration, and they were in fact entered in the register, but for some reason unknown to the purchasers the then Registrar omitted to sign the memorial of the transfer.

On a date subsequent to these transactions, but which does not appear on the record Karuppan Chettiar died and Arunachalam Chettiar was appointed Administrator of his estate.

On the 1st October, 1949, the Debtor and Creditor (Occupation Period) Ordinance, 1948, came into operation and the Bank immediately called upon "Karuppan Chettiar" to reinstate the charge in accordance with the provisions of that Ordinance. A long and fruitless correspondance ensued and finally the Bank launched an action. Under section 11(5) of